Appendix A, Opinion, United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1981
Decided: April 1, 1982
Nos. 278, 279, 280, 281, 282, 370, 371
Argued: October 27, 1981
Docket Nos. 81-1192, 1195, 1196, 1197
1203, 1204, 1254

(SEAL)

UNITED STATES OF AMERICA,

Appellee,

v.

KEVIN KROWN, MAURICE BENJAMIN, JAMES FEENEY, HENRY ROSTEN, ROGER ROSEN and ANTHONY COSTANZO,

Defendants-Appellants.

Before MOORE and NEWMAN, *Circuit Judges* and GRIESA,* *District Judge.*

Appeals from judgments of conviction of the District Court of the Southern District of New York (Hon. Lee P. Gagliardi) on various counts of fraud involving financial instruments issued by fictitious off-shore banks. The convictions are affirmed, except as to certain of the counts against defendants Krown and Benjamin which charge the passing of worthless checks in violation of 18 U.S.C. § 1014.

---

* The Honorable Thomas P. Griesa of the United States District Court for the Southern District of New York, sitting by designation.

The convictions on these counts are reversed on the ground that the statute does not apply to such conduct.

CAROLYN HANNEMAN, Esq., Assistant United States Attorney (JOHN S. MARTIN, JR., United States Attorney for the Southern District), for the Appellee.

KEVIN KROWN, New York, New York, Defendant-Appellant *Pro Se.*

BARRY M. FALLICK, Esq., New York, New York (Rochman, Platzer & Fallick), for Defendant-Appellant Maurice Benjamin.

THOMAS F. LIOTTI, Esqs., Carle Place, New York, for Defendant-Appellant Feeney.

THEODORE KRIEGER, Esq., New York, for Defendant-Appellant Rosten.

JOSEPH P. HOEY, Esq., Mineola, New York (Suozzi, English, Cianciulli & Peirez, P.C.), for Defendant-Appellant Rosen.

BARRY A. BOHRER, Esq., New York, New York, for Defendant-Appellant Costanzo.

GRIESA, *District Judge:*

Kevin Krown, Maurice Benjamin, James Feeney, Henry Rosten, Roger Rosen and Anthony Costanzo appeal from judgments of the District Court for the Southern District

of New York, following a five-week jury trial before Hon. Lee P. Gagliardi, convicting each of them on multiple counts of violation of federal anti-fraud statutes.

We affirm the convictions, except that we reverse as to two counts (53 and 54) of the 49 counts on which Krown was convicted, and as to three counts (53, 54 and 55) of the eight counts on which Benjamin was convicted.[1] Counts 53, 54 and 55 of the indictment charge these defendants with passing worthless checks in violation of 18 U.S.C. § 1014. We hold that this statute is inapplicable to the type of conduct charged.

The proof at trial showed a fraudulent scheme built around two fictitious off-shore banks called First London Bank and Trust Co. and First National Bank of Teheran purportedly located in St. Vincent, West Indies. Large amounts of money were obtained from various victims by the use of fraudulent financial instruments held out as being issued by these banks.

We have considered all the issues raised on appeal, and find that all are without merit except the challenge to the applicability of § 1014.

I.

The facts relevant to this issue are as follows. In November 1978 a company connected with Benjamin purchased certain quantities of meat from a wholesale supplier, one Theresa Amelar. In payment for the first two

---

[1] Krown was sentenced to 15 years imprisonment and was fined a total of $86,000. Benjamin was sentenced to 6 years imprisonment and was fined a total of $29,000. The partial reversals as to Krown and Benjamin will not reduce their terms of imprisonment. However, Krown's fines will be reduced by $10,000 ($5,000 on each of the two reversed counts), and Benjamin's fines will be reduced by $15,000 ($5,000 on each of the three reversed counts).

shipments Benjamin gave Mrs. Amelar two purported certified checks drawn of First National Bank of Teheran ("FNBT") in the amounts of $15,000 and $45,000.

Mrs. Amelar deposited these checks in her account at Marine Midland Bank. Marine Midland put these checks into the federal clearinghouse system for collection. They were promptly returned to Marine Midland stamped "No Such Bank." Mrs. Amelar informed Benjamin of this. Benjamin said to have Marine Midland mail the checks directly to St. Vincent for collection. Accordingly, the checks were resubmitted to Marine Midland, which mailed them to St. Vincent.

While this process was going on, Benjamin placed an order with Mrs. Amelar for a third shipment of meat. This order was filled, and Benjamin gave Mrs. Amelar a third purported certified check drawn on FNBT. This check was for $29,919.32, and was deposited with Mrs. Amelar's account at Marine Midland, which mailed the check directly to St. Vincent for collection.

Later, Benjamin obtained a genuine Bankers Trust Company certified check for $15,000. He sent it directly to Marine Midland for deposit in Mrs. Amelar's account. This was done in order to make it appear to Mrs. Amelar that the original $15,000 FNBT check had been honored.

Ultimately, of course, Marine Midland's efforts to collect the three checks from FNBT were fruitless. Although the amounts of the three fraudulent checks were temporarily credited to Mrs. Amelar's account, by way of a bookeeping entry, there is no evidence that Mrs. Amelar made any withdrawal from her account or received a payment of any kind from the bank, based on the balance created by the three checks.

It does not appear that Krown participated directly in the dealings with Mrs. Amelar, although it was he who "created" the fictitious FNBT.

Appendix A

Marine Midland Bank is a bank w ose deposits are insured by the Federal Deposit Insurance Corporation.

II.

Section 1014 provides in pertinent part:

> "Whoever knowingly makes any false statement or report, or wilfully overvalues any land, property or security, for the purpose of influencing in any way the action of. . .any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . .upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisioned not more than two years, or both."

Judge Gagliardi charged the jury on the elements which needed to be proved for conviction on the § 1014 counts:

> "The essential elements which must be proved in order to establish this offense any defendant are:
>
> 1. That the defendant in question knowingly made, or aided and abetted the making of the false statement or overvaluation concerning a material fact;
>
> 2. That the statement was made for the purpose of influencing the bank's action with respect to an application or advance, commitment or loan;
>
> 3. That the bank was insured by the FDIC."

In his explanation of the term "overvaluation" in the first element, the judge made it clear that he was referring to the overvaluation of security within the language of § 1014, and stated to the jury that a check, about which a false

statement has been made as to its value, would be an overvalued security.

Thus, under the trial judge's instruction, the jury was permitted to find Benjamin and Krown guilty under § 1014, if the jury found that they made or caused to be made a false statement or overvaluation of security which had the purpose of influencing a bank upon an advance, loan, application or commitment.

An initial question is whether the statute is limited to frauds committed directly against the financial institutions referred to in the statute. Benjamin's fraud was directed primarily against Mrs. Amelar. Benjamin did not deal directly with Marine Midland, except in the one instance when he sent the $15,000 Bankers Trust check for deposit in her account.

The statute is not limited by its terms to direct dealings with banks. It covers the making of false statements "for the purpose of influencing in any way" the action of an FDIC insured bank upon certain types of transactions. Thus, the statute is broad enough to apply to fraudulent dealings with third persons where it could *also* be said that there was the purpose to influence a bank upon one of the transactions named in the statute.

In the present case, when Benjamin gave the first two FNBT checks to Mrs. Amelar, he must have known that she would deposit these checks in a bank. After Mrs. Amelar told Benjamin about the problem with the checks, Benjamin's suggestion to have Marine Midland send the checks directly to St. Vincent was designed to prolong the bank's collection process in order to gain time for further fraudulent dealings with Mrs. Amelar. With regard to the third FNBT check, Benjamin intended that the check be deposited in the bank and that the bank would undertake collection via mail to St. Vincent. Benjamin's deposit of the Bankers Trust check at Marine Midland was an addi-

tional act intended to maintain a facade of regularity in his dealings with Mrs. Amelar.

Thus Benjamin was using Marine Midland to facilitate his fraud against Mrs. Amelar. In terms of the statute, it can be said that he had "the purpose of influencing" Marine Midland to accept the certified checks for deposit in Mrs. Amelar's account and to process those checks for collection over as long a time as possible.

This brings us to the issue of whether the certified FNBT checks were false statements or overvalued security within the meaning of § 1014, and the further issue of whether Benjamin had the purpose of influencing the bank in connection with any advance, loan, application or commitment.

It would seem clear that a fraudulent certified check can be a false statement within the meaning of § 1014. Such a check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation. It would also appear that a worthless check could, under certain circumstances, constitute overvalued security for an advance, loan or commitment.

However, there is no basis in the evidence for a finding that Benjamin had the purpose of influencing the bank to use the FNBT checks in connection with an advance, loan, application or commitment. The interpretation of these terms in the statute has produced a split in the circuit decisions. The Fifth Circuit has held that the deposit of worthless checks in a bank and subsequent withdrawal of funds based upon those checks, can constitute an advance or loan within the meaning of § 1014. *United States* v. *Williams*, 639 F.2d 1311 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3375 (Nov. 10, 1981) (No. 80-2116); *United States* v. *Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). Both of these cases involved check kiting schemes. The theory of these decisions is that the banks granted immediate credit to the depositors by permitting withdrawals from the account prior to the collec-

tion of the deposited checks, and that such immediate credit was an advance or loan. The Third Circuit, declining to follow the *Payne* and *Williams* decisions, has held § 1014 inapplicable to a check kiting scheme. *United States* v. *Sher*, 505 F. Supp. 858 (W.D. Pa.), *aff'd per curiam*, 657 F.2d 28, *reh'g en banc denied*, 661 F.2d 34 (3d Cir. 1981). The *Sher* decision relied upon the reasoning in *United States* v. *Pavlick*, 507 F. Supp. 359 (M.D. Pa. 1980). The Third Circuit cases express concern about the possibility that an expansive reading of § 1014 will make that statute a general criminal remedy against the passing of worthless checks, contrary to Congerissional intent.

We agree that § 1014 is not designed to have general application to the passing of worthless checks, and that the language of the statute, limiting it to the specified credit transactions, must be given effect. The Second Circuit has warned against construing § 1014 in such a manner as to transform what would normally be state criminal offenses into federal crimes. *United States* v. *Sabatino*, 485 F.2d 540, 543 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974).

It is unnecessary for use to choose between the Fifth Circuit and Third Circuit views regarding the applicability of § 1014 to check kiting schemes, because the present case does not involve check kiting. Also, it is unnecessary for us to decide whether the granting of immediate credit by a bank, in the form of permitting a withdrawal of funds prior to the collection of a deposited check, constitutes an advance or loan within the meaning of § 1014. In the present case there was no such granting of immediate credit or permission to withdraw funds. All that occurred between Mrs. Amelar and the bank was that she deposited the checks in her account, following which the bank made a bookkeeping entry showing the checks credited to her account, and then attempted to collect the checks. Mrs. Amelar received no funds from the bank based upon the

three fraudulent checks, either in the form of a conventional advance or loan or by way of a withdrawal from her account. The mere bookkeeping credit entry did not constitute an advance or loan within the meaning of § 1014.

Not only was there in fact no advance or loan to Mrs. Amelar, but there is no evidence that Benjamin had the purpose of influencing the bank in connection with an advance or loan. The mere intent to have the bank accept the certified checks for deposit and carry out collection procedures is not sufficient to violate the statute.

It is equally true that there was no "application" or "commitment," or any evidence of a purpose by Benjamin to cause such. These broad terms must be interpreted with reference to the statute as a whole, and can only refer to an application or commitment involving an advance or loan or other credit transaction listed in the statute. *See United States* v. *Pavlick*, 507 F. Supp. 359, 362 (M.D. Pa. 1980). The case relied upon by the Government for the proposition that there was a commitment in the present case, *United States* v. *Stoddart*, 574 F.2d 1050 (10th Cir. 1978), is distinguishable. That case involved an agreement by a bank to permit a withdrawal from an account following a fraudulent representation to the bank by the depositor.

For the foregoing reasons Benjamin's conviction on the § 1014 counts cannot stand. The convictions of Krown on these counts must also fall, since Krown's liability could only derive from that of Benjamin.

The convictions are affirmed, except as to Counts 53 and 54 against Krown and Counts 53, 54 and 55 against Benjamin. As to these counts, we reverse and remand with directions to enter judgments of dismissal.

Appendix B, Order extending time to file petition for Writ of Certiorari

Supreme Court of the United States

No. A-1033

MAURICE BENJAMIN,

Petitioner,

v.

UNITED STATES

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 30, 1982.

/s/ Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 2nd
day of June, 1982

Appendix C, Mailgram

Mailgram Service Center
Middletown, Va. 2264

28 OCT 1981

4-061695s300 10/27/81 ICS IPMMTZZ CSP NYAB
2127729870 MGM TDMT New York NY 523 10-27 0915P EST

Court of Appeals
Attn Judge Moore Judge Newman Judge Griesa
SDNY Foley Square 17 FL
New York NY 10007

Copy of Mailgram to: Barry Fallick Esquire, 230 Park Ave Room 1360, New York NY .0169

RE: 81-1192 U.S. vs. Benjamin

Talking to you today was an amazement, when I told you I had not been consulted regarding the appeal, you called me a liar, what could I have been consulted with? Your entire appeal is based on cases, I am no lawyer, there are many more items in the appeal, for instance the conspiracy charge, the individual counts charging me with illegal acts that were legal, the mistake in the printing, its language, and now being drugged systematically during the entire trial, for the longest period of time you have been telling me that you won't work without money, and then when I said I am sending a messenger to you to pick up your bill, you then said that you would give her a copy of the government's answer of 78 pages, two days before the argument before the Appeals Court, and 1200 miles away from where I am. I haven't seen you for four months, yet you would not even accept my calls even though I paid for all prior calls made to you.

I realize that you must be paid and for that reason, I borrowed $12,500 to give to you. I have no more money and your attitude toward me and the way you have handled

my appeal without my help leaves me to believe that your argument will not have the full force and effect required. For that reason, I wish for the Appeals Court to give me a postponement pending my hearing before Judge Gagliardi for bail on November 4 at 9 AM, and my removal from Springfield Missouri near the place and the attorney where my appeal is being heard and held. Inform the Court that there are two appeals to be heard and that is the reason it was illegal for the Court to commit me to imprisonment in both cases and not allowed to consult or advise and keep me 1200 miles away so that I was unable to help, you realize of course that you did not go through this trial with me and were hired much after the trial to handle the appeal and you should have used my help to prepare this appeal.

I think that your attitude in the past four months leaves me to believe you will not put forth your full efforts, therefore, I beg of you to show this Mailgram to the Court and ask for a postponement of at least two to four weeks so that I may be able to come back to New York to correct any mistakes in the Government's answer which I have never seen because you only gave it to my messenger two hours ago, CCS: Court of Appeals Attn Judge Moore, Judge Newman Judge Griesa Second Circuit SDNY, Foley Square 17 FL, New York NY 10007

Judge Lee Gagliardi, SDNY Foley Square New York, 10007

Maurice Benjamin
02111-054
Springfield Missouri

21:23 EST

MGMCOMP

Appendix C

Mailgram Service Center
Middletown, Va. 22645

4-022102S298 10/25/81 ICS IPMMTZZ CSP NYAB
5164317614 MGM TDMT Long Beach NY 234 10-25 0508P
EST

U S Appeals Court SDNY
17 Floor
Foley Square
New York NY 10007

Please have this Mailgram delivered to the attention of the Judges of the Appeal Court scheduled to hear the Appeal this week on 81-1192 U S versus Benjamin.

Because I have been incarcerated at Sprngfield Missouri for the last 70 days, I did not see or read or help in the preparation of this appeal before or after it was printed or filed. I take exception to some of the items in this brief which I understand is to be argued this week.

I respectfully request an adjournment for that reason and ask for a postponement of the argument. In addition, I have not seen the Governments answer to my appeal. I therefore ask the Appeals Court for an extension of time for argument until I am released on bail by Judge Gagliardi some time next week.

My attorney in New York has not conferred with me because of the distance of the incarceration and my use of the phone here is severly restricted. My jail term was up last week and I am entitled to bail by law. Judge Gagliardi has ask the U S Attorney to release me from Springfield Missouri and bring me to the Southern District of New York, for that reason I ask a postponement of the argument on appeal.

Maurice Benjamin 02111-054 Springfield Mo.

17:07 EST

MGMCOMP